RENDERED: SEPTEMBER 14, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

**SUPREME COURT ORDERED OPINION NOT PUBLISHED:
SEPTEMBER 10, 2008
(FILE NO. 2007-SC-0741-D)**

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-000591-MR

TIMOTHY ELDER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JOHNATHON MONARCH ELDER AND MELISSA ELDER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JOHNATHON MONARCH ELDER — APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 01-CI-000916

PERRY COUNTY HOSPITAL AND PERRY COUNTY MEMORIAL HOSPITAL FOUNDATION — APPELLEES

AND NO. 2005-CA-001843-MR

NORTON ENTERPRISES, INC. D/B/A ALLIANT MANAGEMENT SERVICES, INC. — APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE F. KENNETH CONLIFFE, JUDGE
ACTION NO. 01-CI-000916

TIMOTHY ELDER, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF JOHNATHON

AND NO. 2005-CA-001843-MR

MONARCH ELDER AND MELISSA ELDER,
INDIVIDUALLY AND AS ADMINISTRATOR OF THE
ESTATE OF JOHNATHON MONARCH ELDER APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

COMBS, CHIEF JUDGE: Two sets of appellants have filed appeals in this medical malpractice case, and we have consolidated them for resolution in this opinion: Timothy and Melissa Elder, individually and as administrators of the estate of Johnathon Elder (the Elders); and Norton Enterprises, d/b/a Alliant Medical Services (Norton). They seek review of orders of the Jefferson Circuit Court dismissing two defendants on the basis of the doctrine of *forum non conveniens*. After our review, we conclude that the circuit court erred in ordering dismissals. Accordingly, we vacate and remand.

FACTS

This case has a long and convoluted history. This Court issued a previous opinion in this matter that is relevant to the issue presently before us. We cite the following pertinent portion of that earlier opinion as factual background:

> In February 1999, the Elders took their six-year old son Johnathon to [Perry County Memorial] Hospital [referred to along with defendant Perry County Memorial Hospital Foundation as "PCMH"], because he had a fever and nausea.
>
> Although the Elders lived in Hancock County, Kentucky, and PCMH was in Tell City, Indiana, the Elders took Johnathon to PCMH because it was only about three miles from their home. According to the Elders, Dr. Uzoma Nwachukwu, the emergency room physician, failed [to properly] treat Johnathon, causing him to get sicker. Eventually, Johnathon was transported to a hospital in

> Evansville, Indiana. By then, a bacterial infection had progressed to such a point that the Evansville medical staff was unable to arrest it. Johnathon died.

Elder v. Perry County Hospital and *Norton Enterprises v. Elder*, No. 2005-CA-000591-MR and No. 2005-CA-001843-MR, slip op. at 3 (Ky.App. July 21, 2006).

Several years of complicated litigation ensued after Johnathon's death. In 2001, the Elders filed this lawsuit in Jefferson Circuit Court against Dr. Uzoma Nwachukwu; Perry County Memorial Hospital (PCMH); PhyAmerica (Dr. Nwachukwu's contractor); and Norton, the company hired by PCMH to manage the hospital. Since the initial filing, the Elders settled with Dr. Nwachukwu, and PhyAmerica was dismissed from the case due to bankruptcy. PCMH and Norton were left as the only defendants.

In 2004, PCMH filed motions to dismiss based on lack of personal jurisdiction and subject matter jurisdiction. The Elders filed responses to the motions in which they addressed the jurisdictional issues. On August 3, 2004, the Jefferson Circuit Court dismissed PCMH on the basis of *forum non conveniens*, citing that doctrine *sua sponte* as grounds for dismissal without ever addressing the jurisdictional issues raised by the parties. The Elders then filed a motion to vacate, which the Jefferson Circuit Court granted. After both parties briefed the issue of *forum non conveniens*, the Jefferson Circuit Court once again entered an order dismissing PCMH based on the doctrine of *forum non conveniens*. The Elders filed another motion. On February 14, 2005, the Jefferson Circuit Court amended its order of dismissal, adding language to bar PCMH from raising a statute-of-limitations defense in any other action in any other venue. It similarly dismissed Norton (on August 23, 2005) on the same basis and with the same prohibition as to the statute.

At this point, the best approach to sorting out the tangled litigation that unfolded is to present a time-line summary of the sequence of events both as to PCMH and Norton as follows:

PERRY COUNTY MEMORIAL HOSPITAL

February 14, 2005 – The Jefferson Circuit Court amends its order dismissing PCMH to prevent PCMH from pleading a statute-of-limitations defense in any subsequent action that the plaintiffs might file in Indiana.

March 11, 2005 – The Elders file notice of appeal from the February 14 judgment.

October 28, 2005 – The Elders file an action in Indiana against PCMH and Norton.*

July 21, 2006 – Court of Appeals opinion (the "Minton opinion") vacating and remanding Jefferson Circuit decision.**

August 9, 2006 – PCMH files petition for rehearing. (Norton did not participate in the petition for rehearing.)

September 18, 2006 – Court of Appeals denies PCMH's petition for rehearing.

April 11, 2007 – Supreme Court grants motion for discretionary review; Supreme Court vacates the Court of Appeals decision and remands to the Court of Appeals in light of *Carrico v. Owensboro*, 511 S.W.2d 677 (Ky.1974).

NORTON ENTERPRISES

August 5, 2005 – Jefferson Circuit Court dismisses claims against Norton without prejudice on the basis of *forum non conveniens*.

August 23, 2005 – Jefferson Circuit Court amends its order to prevent Norton from pleading a statute-of-limitations defense

in any subsequent action that the plaintiffs might file in Indiana.

September 2, 2005 – Norton files Notice of Appeal.

October 28, 2005 – The Elders file an action in Indiana against PCMH and Norton.*

July 21, 2006 – Court of Appeals opinion (Minton opinion) vacated and remanded Jefferson Circuit Court decision.**

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* Both PCMH and Norton affected by the Indiana filing.

** All parties affected by the Minton opinion.

It is noteworthy that two notices of appeal (one by the Elders and one by Norton) had been filed and were pending in this Court when the Elders filed an action in Indiana against PCMH and Norton on October 25, 2005. This Court issued its opinion on September 21, 2006, in which it resolved both appeals (*i.e.,* the appeal by the Elders and by Norton). Judge Minton, writing for this Court, soon assumed a seat on the Supreme Court and recused himself from its deliberations on this case.

After PCMH was dismissed from the case, the Elders decided to litigate the matter in Indiana rather than Kentucky. Therefore, they sought to have Norton dismissed from the Kentucky lawsuit as well on *forum non conveniens* grounds in order to litigate against both parties in a single action in Indiana. Norton had filed a motion for summary judgment. However, without deciding the merits of that motion, the Jefferson Circuit Court dismissed Norton on the basis of *forum non conveniens* and included the prohibition against its ability to assert a statute-of-limitations defense in any other court.

Norton subsequently filed an appeal protesting its dismissal. Because of the possibility that Norton might prevail, the Elders filed an appeal challenging PCMH's

dismissal in order to maintain the option of litigating against both defendants in a single action in Kentucky.

The previous opinion of our Court (the "Minton opinion") declined to address the issues of personal and subject matter jurisdiction, focusing instead on the doctrine of *forum non conveniens*. We summarize the holdings flowing from that opinion:

1. The claims against Norton should be remanded in order for the trial court to examine whether an alternate forum would in fact be available because Indiana's statutes of limitations might preclude a new filing;
2. The trial court lacked any authority to prevent the parties from raising the defense of statute of limitations in Indiana;
3. The trial court did not correctly consider the factors governing motions filed pursuant to the doctrine of *forum non conveniens*;
4. As to Norton's appeal, the trial court improperly granted the plaintiffs' motion based on *forum non conveniens* since that doctrine is intended for use by a defendant to contest the forum chosen by a plaintiff.
5. The trial court erred in interjecting (*sua sponte*) the doctrine of *forum non conveniens* because it is meant to be the prerogative of a defendant to assert the doctrine as a defense;
6. The trial court erred by dismissing PCMH on its own motion on *forum non conveniens* grounds because by the very nature of *forum non conveniens*, the court is admitting that it has jurisdiction but is

relinquishing it – as distinguished from making a clear determination at the threshold as to the issue of its jurisdiction;

7. The trial court erroneously failed to give deference to the plaintiffs' choice of forum and to consider substantive law when it based its dismissal on the procedural ground of *forum non conveniens*.

The Minton decision vacated the dismissals by the trial court and remanded the cases to Jefferson Circuit Court.

In reaction to the Court of Appeals opinion, PCMH (but not Norton) filed a petition for rehearing, which was denied. PCMH then filed a motion for discretionary review in the Supreme Court of Kentucky, which was granted. The Supreme Court issued an order vacating the Court of Appeals decision and remanding it to the Court of Appeals for re-examination in the light of *Carrico v. Owensboro*, 511 S.W.2d 677 (Ky. 1974). This opinion is the result of that order. As we have already noted, the original Court of Appeals opinion was authored by Judge Minton, who subsequently was elected to the Supreme Court. He recused himself from consideration of the matter by the Supreme Court. Additionally, we note that his departure from the Court of Appeals is the reason that this matter has been assigned to a new panel of this Court.

ANALYSIS

Personal and Subject Matter Jurisdiction Over PCMH

To recapitulate, the Supreme Court has directed us to reexamine the orders of the trial court in light of *Carrico, id*. *Carrico* holds that if a decision can indeed be affirmed, it remains susceptible of affirmation on any grounds – regardless of whether the proper grounds were recited and relied upon by the trial court. Therefore, we shall

address PCMH's arguments that the dismissal of the claims against it should be affirmed because Jefferson Circuit Court lacked both personal jurisdiction over it and subject matter jurisdiction over the action.

PCMH contends that the Jefferson Circuit Court lacked personal jurisdiction over it because it is a corporation organized and operating in the state of Indiana and because the tortious act in question, the negligent treatment of Johnathon Elder allegedly resulting in his death, occurred in Indiana. PCMH argues that under Kentucky's long-arm statute, Kentucky Revised Statutes (KRS) § 454.210, a tort must have been committed *within* the Commonwealth of Kentucky in order for Kentucky to exercise jurisdiction. However, in *Mohler v. Dorado Wings, Inc*., 675 S.W.2d 404, 407 (Ky.App. 1984), this Court held that "[i]f a defendant is transacting business within the Commonwealth, it is not necessary that a tort be committed herein." In *Mohler*, the Court ruled that an airline was subject to the jurisdiction of Kentucky courts even though its only contact with Kentucky was based on its contracts with other airlines who transacted business in the Commonwealth. Such a tenuous connection was deemed a sufficient basis to assert jurisdiction.

Moreover, in *Nat'l Grange Mut. Ins. Co. v. White*, 83 S.W.3d 530, 533 (Ky. 2002), the Supreme Court of Kentucky held that the long-arm statute is not an exclusive grant of jurisdiction. In addition to the long-arm statute, *White* directed that jurisdiction must be evaluated in terms of the following factors:

1. Did the appellant have minimum contacts with this Commonwealth such that the maintenance of a lawsuit would not offend traditional

notions of fair play and substantial justice? (*Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945)).

2. Did appellant purposefully avail itself of the opportunity to conduct commercial activities within this Commonwealth – thus invoking the benefits and protections of our laws? (*Hanson v. Denckla*, 357 U.S. 235, 78 S.Ct.1228, 2 L.Ed.2d.1283 (1958)).
3. Did appellant have a connection with this Commonwealth such that it could reasonably anticipate being haled into court here? (*World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980)).

White at 534 (numbering added).

We shall examine the case before us in light of the three *White* criteria. As to the first factor, we note that PCMH does have minimum contacts with Kentucky. It employs Kentucky residents; at one time, it owned and operated a clinic in Kentucky; it advertises in Kentucky; it is a member of the Hancock County, Kentucky, Chamber of Commerce; it travels into Kentucky and holds promotional clinics; and it contracts with Kentucky insurance providers and physicians. As the trial court remarked in its January 24, 2005, order, "it appears that Perry County Memorial Hospital and Perry County Memorial Hospital Foundation have the minimum contacts with this forum that would provide this Court personal jurisdiction over them."

As to the second *White* criterion, it is wholly reasonable to conclude that through its activities in Kentucky, PCMH purposefully availed itself of the protections and benefits of Kentucky law in conducting its commercial activities in Kentucky. For

example, it could expect that its contracts with Kentucky citizens would be enforceable in Kentucky courts and that it could rely on invoking the jurisdiction of Kentucky courts to assert its rights and interests. Therefore, in addition to the first two *White* factors, we note that the third factor of "reasonably anticipating being haled into a Kentucky court" is clearly met.

PCMH also argues that Kentucky lacks subject matter jurisdiction in this case because it should be governed by Indiana's Medical Malpractice Act (MMA), which provides caps for damages in medical malpractice lawsuits. Thus, a choice-of-law argument is presented. Kentucky's courts are courts of general jurisdiction. As noted in *Mohler*, *supra*, torts need not have been committed in Kentucky in order to be litigated in Kentucky. Nonetheless, we shall carefully examine the choice-of-law issue premised upon Indiana's MMA.

PCMH invokes its right to rely upon the protection afforded by the MMA. However, Kentucky courts will apply Kentucky law "whenever it can be justified." *Rutherford v. Goodyear Tire and Rubber Co*., 943 F.Supp. 789, 792 (W.D.Ky. 1996). In this case, application of Kentucky law can be justified because Kentucky courts do have jurisdiction over cases involving tortious acts committed outside the Commonwealth. See *Mohler, supra*. Moreover, the plaintiffs are residents of Kentucky, and "Kentucky's . . . laws. . . are designed primarily to protect its own citizens." *Rutherford* at 792.

Kentucky courts have historically applied Kentucky law if and when they have determined that application of the laws of a sister state would violate Kentucky public policy. In a highly similar case, a Federal Court of the Eastern District of Kentucky applied Kentucky law in a medical malpractice suit in which a Kentucky

resident had been injured in a medical procedure performed in Ohio by an Ohio doctor. *Kennedy v. Ziesmann*, 522 F.Supp. 730 (E.D.Ky. 1981). The court found "the most significant factor" in choosing Kentucky law to be that "a Kentucky resident ... would, if defendant's theory prevails, be subjected to the Ohio medical claim act, which provides for a procedure which is arguably contrary to Kentucky's public policy." *Id*. at 731. Section 54 of the Constitution of Kentucky unequivocally provides: "The General Assembly shall have no power to limit the amount to be recovered for injuries resulting in death. . ." Accordingly, since Indiana's MMA directly contradicts Kentucky public policy, application of Kentucky law is appropriate in this case.

The Trial Court's Application of *Forum Non Conveniens*

After our review in light of *Carrico,* we conclude that the Jefferson Circuit Court does indeed have both personal and subject matter jurisdiction over PCMH. We must next determine whether it was proper for Jefferson Circuit Court, *sua sponte,* to apply the doctrine of *forum non conveniens*.

We shall first review the historic background of the doctrine of *forum non conveniens*. In *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed.1055 (1947), the United States Supreme Court set forth guidelines to be used when determining whether dismissal under *forum non conveniens* is appropriate. It first acknowledged that "a state court 'may in appropriate cases apply the doctrine of *forum non conveniens*.'" *Id*. at 504 (citations omitted). It then went on to say, "it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." *Id*. at 506-07. The Court then listed various factors affecting the parties, including:

> relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious, and inexpensive. . . .But *unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. . . .*

Id. at 508 [emphasis added]. The Court also considered public interest factors involving administrative difficulties for the courts and the burden of jury duty imposed on foreign communities. *Id*. at 508-09.

We shall next examine the doctrine's history in the Commonwealth of Kentucky. In its first case addressing this issue, the Supreme Court of Kentucky announced: "a court, even though it has jurisdiction, will not entertain a case if it conceives itself to be a *seriously inconvenient* forum so long as an appropriate forum is available to the party seeking relief." *Carter v. Netherton*, 302 S.W.2d 382, 384 (Ky. 1957) (Emphasis added.) The court went on to provide a two-prong test for whether *forum non conveniens* should be applied: 1) that since the parties seeking relief elect to choose the place for filing suit, their choice of forum should not be disturbed except for weighty reasons; 2) that the action will not be dismissed in any event unless an alternative forum is available to the party seeking relief. *Id*. In *Williams v. Williams*, 611 S.W.2d 807, 809 (Ky.App. 1981), this Court held that the matter of *forum non conveniens* is based on the court's sound discretion. An appellate court should not disturb such a discretionary finding by a trial court absent an abuse of discretion.

The Elders argue that the trial court abused its discretion in dismissing PCMH. We agree. Although the trial court addressed the issues of the plaintiffs'

convenience and differences of substantive law, we conclude that both analyses were erroneous.

As we have noted, ample authority exists – both in Kentucky law and in federal law – to support a court's deference to the plaintiff's choice of forum. *See Gulf Oil*, *Carter, supra*. Furthermore, *forum non conveniens* must be viewed as a personal privilege for the defendant, not a "stricture on the court." *Leroy v. Great Western United Corp*., 443 U.S. 173, 180, 99 S.Ct. 2710, 2715, 61 L.Ed.2d 464 (1979); *see also Fritsch v. Caudill*, 146 S.W.3d 926, 927 (Ky. 2004).

The Elders argue that they chose Jefferson County as a more convenient forum. As a result of PCMH's dismissal, a hardship will result in that the lawsuit will have to be conducted in two states. They also expressed a need for expert witnesses, who will have to travel in order to attend the trial. They would need to fly into the Louisville airport – regardless of whether the trial was in Louisville or in Tell City, Indiana. They contend that it would be far more convenient for those witnesses to stay in Louisville rather than to travel the considerably greater distance to Tell City. The Elders also observe that the attorneys for all parties have their offices in Louisville – some in direct proximity to the courthouse. Litigating in Indiana would require obtaining new counsel after six years of litigation have already transpired.

The Elders submit that the trial court erred in assessing the substantive change in law that was likely to result from the change in forum. They rely on *Piper v. Reyno*, 454 U.S. 235, 247, 102 S.Ct. 252, 261, 70 L.Ed.2d 419 (1981), in which the United States Supreme Court observed: "The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non*

conveniens inquiry." It qualified that holding, however, by adding that a change in substantive law *could be considered* in cases where "the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all. . . ." *Id*. at 254. This reasoning applies in the case before us. In light of the caps mandated by Indiana's MMA, the remedy could surely be defined as inadequate under Kentucky law in which no such caps exist and where Section 54 of our Constitution clearly articulates that our public policy will tolerate no such limits on an injury resulting in death. Thus, the first prong of the *Carter* criteria cannot be met as no weighty substantive reasons can be found to support dismissal.

In its previous opinion addressing this case, this Court correctly held the trial court's dismissal of defendant Norton under the doctrine of *forum non conveniens* was erroneous because the trial court must consider whether an alternative forum exists before ordering a dismissal. In *Norwood v. Kirkpatrick*, 349 U.S. 29, 31, 75 S.Ct. 544, 546, 99 L.Ed. 789 (1955), the United States Supreme Court observed:

> [The *forum non conveniens*] doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. *It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate.*

Quoting *All States Freight v. Modarelli*, 196 F.2d 1010, 1011 (3rd Cir. 1952) (Emphasis added). In this case, it is likely that the Elders will be prohibited from bringing their case against Norton in Indiana because the Indiana statute of limitations has expired, and voluntary dismissal by a plaintiff in a prior action does not serve to toll the statute of

limitations. *Al-Challah v. Barger Packaging*, 820 N.E.2d 670, 672 (Ind.App. 2005). As noted in the previous opinion of the Court, the trial court – despite its recitations to the contrary – lacked the authority to prohibit the defendants from raising the defense of the statute of limitations in Indiana. Thus, the second prong of the *Carter* test cannot be satisfied (*i.e.*, that an action will not be dismissed unless an alternative forum is found).

This Court also suggested the trial court should have "take[n] into account the length of time the case had been pending before the doctrine of *f[orum] n[on] c[onveniens]* was invoked." *Elder v. Perry County Hospital* and *Norton Enterprises v. Elder*, No. 2005-CA-000591-MR and No. 2005-CA-001843-MR, slip op. at 10 (Ky.App. July 21, 2006). In *U.S. v. Nat'l City Lines*, 334 U.S. 573, 590-92, 68 S.Ct. 1169, 1178-1180, 92 L.Ed. 1584 (1948), the United States Supreme Court discussed the importance of avoiding delay caused by the use of the *forum non conveniens* doctrine. Efficiency of the courts is one of the factors recited in the *Gulf Oil* public-interest test for determining whether a case should be dismissed on *forum non conveniens* grounds. There can be no dispute that it would be egregiously inefficient to countenance additional delay in a case which has been in litigation for more than six years already.

In its previous opinion, this Court also remarked that the trial court erred in applying *forum non conveniens* without consideration of the *Gulf Oil* factors. Indeed, in *Gulf Oil*, the Court stated, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Id*. at 508. The Eleventh Circuit has held, "where the court does not weigh the relative advantages of the respective forums but considers only the disadvantages of one, it has abused its discretion." *Le Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983).

In this case, the trial court's order of dismissal merely addressed the convenience of litigating in Indiana and neglected to analyze or to compare the conveniences or inconveniences entailed in litigation in Louisville. It did not give due consideration to the *Gulf Oil* criteria.

CONCLUSION

As instructed by the Supreme Court of Kentucky, we have carefully examined this case under *Carrico*. We hold that the Jefferson Circuit Court's decision cannot be affirmed. The Jefferson Circuit Court has both personal and subject matter jurisdiction over defendant PCMH. Additionally, the trial court improperly applied the doctrine of *forum non conveniens* in its dismissal of both defendants PCMH and Norton Enterprises. Accordingly, we vacate the orders of dismissal and remand this matter to Jefferson Circuit Court.

ALL CONCUR.

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